EG Tan & Co (In liquidation) v Tan Chong San

HIGH COURT (KUALA LUMPUR) — SUIT NO D4–23–1116 OF 1987
KAMALANATHAN RATNAM J
11 SEPTEMBER 1998

Evidence *— Burden of proof — Fiduciary relationship between broker and client — Whether mere relationship of confidence per se between broker and client is sufficient — Burden to establish position of 'active confidence' — Whether burden discharged — Evidence Act 1950 s 111*

Securities *— Shares — 'Roll-over' transaction — Claim for contra losses, interest and registration charges incurred in the course of trading in purchase and sale of shares — Whether 'roll-over' transactions of shares not traded through stock exchange nor transacted by way of a 'married deal' were legal — Rules of the Stock Exchange (Singapore) by-law 14(5)(ii)*

Securities *— Shares — Sale and purchase — Charges pursuant to — Whether charging of brokerages both on sale and purchase of shares in a 'roll-over' transaction was prohibited — Whether charging of compound interest on margin account was illegal and unenforceable — Rules of the Stock Exchange (Singapore)*

The plaintiff, a company incorporated in Singapore, was at all material times a share broker and member of the Stock Exchange of Singapore. The defendant had opened a share margin account with the plaintiff through its director to enable the defendant to purchase and sell shares. The plaintiff claimed against the defendant for contra losses, interest and registration charges incurred by the defendant in the course of his trading in the purchase and sale of shares of public listed companies ('the shares') through the plaintiff.

The issues were, inter alia, whether: (i) the defence could rely on its submission that the law of Singapore had been breached when it had failed to call expert evidence to substantiate its case; (ii) the 'roll-over' transactions of shares in the defendant's margin account — which the plaintiff alleged were not traded through the stock exchange nor transacted by way of a 'married deal' — were contrary to by-law 14(5)(ii) of the Rules of the Stock Exchange of Singapore ('the Rules') and therefore not enforceable; (iii) the plaintiff was prohibited by the Rules from charging brokerages both on sale and purchase of shares in a 'roll-over' transaction; (iv) the charging of compound interest on the defendant's margin account was illegal and unenforceable; and (v) as a result of s 111 of the Evidence Act 1950 ('the Act'), there is a fiduciary relationship between the plaintiff and the defendant.

Held, allowing the claim:

(1) The defendant had sufficiently established its reliance on the law of Singapore in the course of cross-examination of the expert witness PW2. No further purpose would have been achieved by

calling yet another expert to explain the laws of Singapore, as applicable in this case (see p 590B–C).

(2) There was nothing in the Singapore Securities Industry Act 1973 or Regulations prohibiting 'roll-over' transactions; it was a matter of agreement between the broker and his client. The shares in this case were transacted by 'married' contracts; such 'married deals' transacted between two brokers would essentially involve a transaction between 'two clients within a member company' and would be within the meaning of by-law 14(5)(ii) of the Rules. On the issue of roll-over by 'book entry' as stated by the expert PW2, and relied on by the defence, since this issue was never pleaded, the defendant ought not to be allowed to raise issues not raised in his pleadings (see p 592B, G–H).

(3) Since a 'roll-over' transaction is in the nature of two fresh and independent contracts, the plaintiff is entitled to charge brokerages on both sale and purchase of shares. Furthermore, having admitted the plaintiff's entitlement to both the commissions, it ill behoved the defendant to continue to cry foul (see p 593C–E). Moreover, the defendant did not lead any evidence that such charging of interest was against the Rules (see p 593G–H).

(4) The defendant was estopped from denying the plaintiff's entitlement to charge compound interest since there was no evidence to show that he had objected to the compound interest charges after he had knowledge of that fact (see p 596I).

(5) A mere relationship of confidence per se between a broker and his client will not be sufficient to invoke s 111 of the Act as there must be a relationship of 'active confidence'. The burden was on the defendant to establish that the plaintiff was standing in a position of 'active confidence' to him in the sense that the defendant could not, by reason of his relationship with the plaintiff, make his own independent decisions. This the defendant had failed to prove (see p 598F–H).

[Bahasa Malaysia summary

Plaintif yang merupakan sebuah syarikat yang telah diperbadankan di Singapura, adalah pada semua masa material broker saham dan ahli Bursa Saham Singapura. Defendan telah membuka satu akaun margin saham dengan plaintif melalui pengarahnya bagi membolehkan defendan membeli dan menjual saham-saham. Plaintif telah menuntut terhadap defendan bagi mendapatkan kerugian kontra, faedah dan bayaran-bayaran pendaftaran yang telah ditanggung oleh defendan dalam menjalankan perdagangannya membeli dan menjual saham-saham syarikat tersenarai awam ('saham-saham tersebut') melalui plaintif.

Isu-isunya adalah, antara lain, sama ada: (i) pihak pembelaan boleh bergantung pada penghujahannya bahawa undang-undang

Singapura telah diingkari tatkala ianya gagal untuk memanggil keterangan pakar bagi menyokong kesnya; (ii) transaksi-transaksi saham yang 'bergulung matang' dalam akaun margin defendan — yang mana plaintif mendakwa tidak diperdagangkan melalui bursa saham tersebut mahupun dilaksanakan melalui suatu 'married deal' — adalah bertentangan dengan undang-undang kecil 14(5)(ii) Kaedah-Kaedah Bursa Saham Singapura ('Kaedah-Kaedah tersebut') dan dengan itu tidak boleh dikuatkuasakan; (iii) plaintif dilarang oleh Kaedah-Kaedah tersebut daripada mengenakan bayaran pembrokeran ke atas penjualan dan juga pembelian saham-saham dalam sesuatu transaksi 'bergulung matang'; (iv) pengenaan faedah kompaun ke atas akaun margin defendan tidak sah di sisi undang-undang dan tidak boleh dikuatkuasakan; dan (v) akibat s 111 Akta Keterangan 1950 ('Akta tersebut'), terdapatnya perhubungan fidusiari antara plaintif dan defendan.

Diputuskan, membenarkan tuntutan:

(1) Dalam memeriksa balas saksi pakar PW2, defendan telah membuktikan pergantungannya ke atas undang-undang Singapura dengan secukupnya. Tiada tujuan yang seterusnya akan tercapai dengan memanggil satu lagi pakar untuk menerangkan undang-undang Singapura, sepertimana yang terpakai dalam kes ini (lihat ms 590B–C).

(2) Tidak terdapat apa-apa dalam Peraturan-Peraturan atau Akta Perindustrian Sekuriti Singapura 1973 yang melarang transaksi-transaksi 'bergulung matang'; ia hanya merupakan suatu persetujuan antara broker dan kliennya. Saham-saham dalam kes ini telah diperdagangkan melalui kontrak-kontrak 'married'; 'married deals' sedemikian yang telah dijalankan antara dua broker pada dasarnya melibatkan satu transaksi antara 'two clients within a member company' dan akan terlingkung dalam maksud undang-undang kecil 14(5)(ii) Kaedah-Kaedah tersebut. Mengenai isu bergulung matang melalui 'book entry' sepertimana yang dinyatakan oleh saksi pakar PW2, dan yang mana diharapkan oleh pihak pembelaan, oleh kerana isu ini tidak pernah diplidkan, defendan tidak seharusnya dibenarkan untuk membangkitkan isu-isu yang telah tidak dibangkitkan dalam pliding beliau (lihat ms 592B, G–H).

(3) Oleh kerana transaksi 'bergulung matang' mempunyai sifat dua kontrak bebas dan baru, plaintif berhak untuk mengenakan yuran pembrokeran ke atas penjualan dan juga pembelian saham-saham. Tambahan pula, setelah mengakui keberhakan plaintif kepada kedua-dua komisyen, defendan sepatutnya tidak terus mempertikaikan perkara ini (lihat ms 593C–E). Lagipun, defendan tidak mengemukakan sebarang keterangan bahawa pengenaan faedah yang sedemikian adalah bertentangan dengan Kaedah-Kaedah tersebut (lihat ms 593G–H).

(4) Defendan diestop daripada menafikan keberhakan plaintif untuk mengenakan faedah kompaun oleh kerana tidak terdapatnya keterangan bagi menunjukkan bahawa beliau telah membantah terhadap bayaran faedah kompaun selepas beliau mengetahui mengenai hakikat itu (lihat ms 596I).

(5) Hubungan keyakinan per se semata-mata antara broker dan kliennya tidak mencukupi untuk menggunakan s 111 Akta tersebut kerana seharusnya terdapat perhubungan 'active confidence'. Beban terletak pada defendan untuk membuktikan bahawa plaintif berada dalam kedudukan 'active confidence' terhadap beliau dalam ertikata bahawa defendan tidak boleh bebas untuk membuat keputusan sendiri disebabkan perhubungannya dengan plaintif. Defendan telah gagal membuktikan hakikat ini (lihat ms 598F–H).]

Notes

For cases on burden of proof, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 158–359.

For cases on shares, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 781–789.

Cases referred to

Bentinck v London Joint Stock Bank [1893] 2 Ch 120 (refd)

Bongiovanni v Societe Generale (1886) 2 TLR 247 (refd)

Perwira Habib Bank (M) Bhd v Penerbitan ASA Sdn Bhd & Ors [1998] 5 MLJ 297 (refd)

YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd [1997] 2 MLJ 621 (refd)

Legislation referred to

Evidence Act 1950 s 111

Rules of the Stock Exchange by-law 14(5), (ii) [Sing]

Securities Industry Act 1973 [Sing]

Shamsul-Bahrain bin Ibrahim (*CC Chan* and *Mazita Mokty* with him) (*Skrine & Co*) for the plaintiff.

Chandran G Nair (*Thevin Chandran & Wong*) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam J: The plaintiff, a company incorporated in Singapore, was at all material times, a share broker and member of the Stock Exchange of Singapore. It had been ordered to be wound up by the Singapore High Court on 1 August 1986. The plaintiff's claim against the defendant is for the sum of S$907,159.42 being contra losses, interest and

registration charges incurred by the defendant in the course of his trading in the purchase and sale of shares of public listed companies, through the plaintiff. The plaintiff is also claiming interest on the said sum at the rate of 16.425% per annum from 1 December 1986 to the date of final payment and costs. The said sum of S$907,159.42 is made up as follows:

Particulars

Contra Losses				
OD	26796/B	S$	10,143.18	
OD	29425	S$	15,043.80	
OD	29472	S$	15,114.89	
OD	29504	S$	38,201.23	
OD	30872	S$	14,848.50	
OD	30895	S$	57.50	
OD	30933	S$	965.25	
OD	30959	S$	6,239.30	
OD	30975	S$	1,850.45	
OD	31402	S$	2,740.00	
OD	31946	S$	5,731.50	
OD	31957	S$	1,350.03	
OD	32343	S$	4,951.78	
OD	32473	S$	5,533.01	
OD	32477	S$	4,512.81	
OD	32499	S$	450,473.25	S$ 577,756.68
Add: Interest from January 1985 to 30 November 1986				S$ 349,181.54
Add: Registration Charges				S$ 3,223.90
				S$ 930,162.12
Less: Cash Security				
Deposit		S$	17,834.20	
Payments				
20 January 1986		S$	2,585.00	
17 February 1986		S$	2,583.50	S$ 23,002.70
				S$ 907,159.42

The defendant in his amended defence admitted that there were certain transactions for the purchase and sale of shares between him and the plaintiff but denies that there was any amount owing by him to the plaintiff. On the other hand, in his amended defence, he stated that there was a sum of S$45,512.75 owed to him by the plaintiff and thus he counterclaimed for the said sum together with prayers for various declarations. However, after the conclusion of DW1's examination-in-

chief, the defendant withdrew his counterclaim which I then dismissed with costs.

The defendant had opened a share margin account with the plaintiff through one EG Tan in or about December 1982 to enable the defendant to purchase and sell shares. At the material time, EG Tan was a director of the plaintiff. Although there was no specific written agreement entered into between the plaintiff and the defendant, concerning the margin account, it is a fact that the defendant had maintained a margin account with the plaintiff and had traded on it.

Finding of the court

From the evidence adduced, I find that the terms of the share margin account were as follows:

(1) that the defendant was allowed a margin of 30%;

(2) that if the margin fell below this permitted level, the defendant was required to 'top up' the margin which could be done in a number of ways, such as:

   (a) depositing share certificates not in the margin account with the plaintiff;

   (b) payment of cash or cheque into the margin account;

   (c) disposing of the shares by the plaintiff in the margin account and depositing the proceeds of sale into the margin account;

   (d) when the defendant has suffered a contra loss in the sale of his shares, the amount of loss would be 'contraed off' (debited) from his margin deposit and he was required to settle the contra loss on the date of the sale of the shares.

The defendant however contended that the interest chargeable should only be 10% as this was a special arrangement made between him and the plaintiff. He was shocked when he subsequently discovered that the interest rate charged was 16.425%. But more on this later.

Exculpatory terms

From the agreed and admitted bundles of documents (CABD), I note that whenever a deposit was credited into the margin account of the defendant, a letter would be issued by the plaintiff to the defendant acknowledging the deposit. These letters contained an important notice which reads:

> It is understood that your remisier is fully authorized to withdraw cash from your deposit to pay for your outstanding purchases, interest or contra losses.

In the circumstances, it is clear that the defendant was already aware of this condition. There is no evidence that he had in any case objected to the same. On this basis, I find as a fact that from time to time, withdrawals were made from the defendant's margin account on behalf of the defendant to pay for:

(1) contra loss in the sale of shares;
(2) share registration;
(3) rights subscriptions;
(4) purchase of shares; and
(5) interest.

I also find that once a withdrawal is made from the margin account for any of the abovementioned purposes, a letter would be sent to the defendant informing him of such a withdrawal. All these letters are included in the CABD and they commence with the words 'as per your instructions ...'. Again I find that the defendant had made no protest that he had not given any such instructions nor is there any evidence that the defendant had at any time objected to such withdrawals. In answer to this, the defendant argued that the plaintiff was in a fiduciary position and thus there was no reason to mistrust the plaintiff. I shall deal with the fiduciary intent later.

It is obvious that the defendant's investment in the purchase and sale of shares through the plaintiff was very substantial and that these shares were in fact speculative in nature. From para 5(11) of the amended defence, I note that the defendant had invested in more than RM12.6m worth of shares.

PW1, the administrative manager of the plaintiff and who has been retained by the liquidators of the plaintiff to assist them, testified that a contract note would be sent to the defendant the next day after the plaintiff had bought or sold the shares for the defendant. The defendant in evidence admitted receiving these documents and also confirmed that the information contained in the documents were true and accurate. Apart from the contract notes, PW1 confirmed that the plaintiff would also send statements on contra losses, contra gains and in addition, the monthly statements. These too the defendant admitted receiving and also confirmed that they were true and accurate. There is no dispute on the total sum of S$907,159.42 as at 30 November 1986 because under cross-examination, the defendant admitted that if both the interest and the brokerage were added, the outstanding sum would add up to S$907,159.42 as at 30 November 1986.

The law of Singapore applicable

It is common that the law applicable in this case is the law of Singapore. It is settled that a point of foreign law is a question of fact upon which evidence must be given at the trial. In *YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd* [1997] 2 MLJ 621, Mahadev Shankar JCA said at p 663B–D:

> So far as this case is concerned, we want to emphasise so far as the expert evidence is concerned that the existence of any relevant Singapore legislation, and the rules of the Singapore Stock Exchange (being the law and the rules of a corporate institution of a foreign jurisdiction) and any judicial pronouncement thereon by a Singapore Court is an issue of fact upon which evidence must be given. But having so established the existence of such

legislation or rules, the effect of their application to the particular facts of this case is a question of law for this court to decide.

The plaintiff argued that since the defence had failed to call any expert evidence to substantiate its case that the law of Singapore had been breached, the defendant cannot rely on such a submission. The plaintiff, during the course of its case, had called Associate Prof Walter Woon ('PW2') as its expert witness. I am satisfied that the defendant had sufficiently established its reliance on the law of Singapore in the course of cross-examination of PW2 and that no further purpose would have been achieved by calling yet another expert to explain the laws of Singapore, as applicable in this case. I intend to deal with this case by looking at issues raised in submissions by the parties.

Legality of 'roll-over' transactions

The defendant has in his amended defence, raised the issue of 'roll-over' of 118,000 units of UMFM shares on 29 May 1985. 'Roll-over' is described in stock exchange parlance as 'carrying over', 'continuation' or more commonly known as 'contango' (see 45 *Halsbury's Laws of England* (4th Ed) paras 100–101 at p 75). In *Bongiovanni v Societe Generale* (1886) 2 TLR 247, Lord Justice Lindley held that to 'continue' in Stock Exchange phraseology means 'to sell and to agree to rebuy the same amount of stock at a future day at the same price and a sum for the accommodation'. Such a transaction is a sale and repurchase, not a loan. In *Bentinck v London Joint Stock Bank* [1893] 2 Ch 120 at p 140, North J held that contango transactions are not regarded as loans.

The mechanics of roll-over

The defendant would instruct the plaintiff to buy a block of shares and the parties would agree to a settlement date of 30 days. On the settlement date, the plaintiff would first sell the block of shares (the first leg). On the same day, the second purchase for the same number of shares was then entered into by the plaintiff for settlement on the next ensuing accounting day (second leg). The same process is repeated at the next settlement date if the shares were required to be 'rolled-over' again. In any case, the defendant herein also admitted that he would have a grace period of 30 days in a 'roll-over'. *Halsbury's Laws of England* (4th Ed) Vol 45 p 41 states that the consent of the client to 'carry over' or 'roll-over' could be presumed where the client had raised no objection, knowing that the broker had so acted on previous occasions or even on one previous occasion.

PW2, the expert witness, testified that the advantages of a 'roll-over' transaction is that it would allow the client to avoid crystallization of the loss whilst hoping that the market would turn in his favour and further it also means that the client has an extended period to raise finance to pay. This is consistent with the evidence of the defendant who said in cross-examination that the 'roll-over' transactions were 'to buy time' so that he could have a '30-day fresh grace period'. In fact, PW1 best explained the

benefit accrued by the defendant by resorting to the 'roll-over' transaction. He said in cross-examination:

> If this counter is not rolled over, then the client will have to pay roughly RM1.2m to pick up the 118,000 (UMFM) shares. If he contraed off or sell at the current price, eg RM7.00 (on 29 May 1985), average price is RM10.00, so client lost RM3.00. So it's 118,000 x RM3 amounts to 0.5m. So, by rolling at the same price, it benefits the client.

In summarizing the defence as pleaded regarding the roll-over, the defendant had averred:

(1) that the 'roll-over' of the 118,000 units of UMFM shares were not traded through the stock exchange nor transacted by way of a 'married' deal;

(2) that the defendant was himself acting as principal at all times; and

(3) that the 'roll-over' was contrary to the Rules of the Stock Exchange of Singapore and was not enforceable.

'Married deal'

Associate Prof Walter Woon explained a 'married deal' as a form of direct business. He said in examination-in-chief:

> ... Instead of executing a transaction on the trading floor, a broker could 'marry' a buy order placed by one client with a sell order placed by another client.

As to the legality of such a transaction, he said:

> I believe that this was specifically provided for in by-law 14 of the SES By-Laws at the material time. As a matter of principle, it is open to a buying or selling agent to 'cross' orders placed by different clients so as to fulfil the instructions of both. As long as the broker (who is a fiduciary of both) avoids favouring one client over another, there is no breach of duty.

It is not disputed that there were altogether 31 'roll-over' transactions in the defendant's margin account out of which seven 'roll-over' transactions involved the UMFM shares since the first purchase of those shares. I find that the defendant had failed to prove any of the three allegations raised in the defence. The evidence showed that the defendant had purchased a block of 118,000 units of UMFM shares from 19 March 1984 to 24 April 1984 at prices ranging between S$9.80 to S$13.20 per share for a total cost of about RM1.4m. The evidence further showed that the said block of 118,000 units of UMFM shares were finally sold between May 1985 to June 1986. I also find that this particular counter had a very low turnover in volume. Under cross-examination, it became clear that the defendant had knowledge of all the 'roll-over' transactions at the material time, as conducted by the plaintiff. In fact, the defendant even gave reasons and conditions for effecting the 'roll-over' transactions. The UMFM shares were transacted by 'married' contracts due to their very low turnover in volume. There is evidence to show that only one lot of UMFM shares was transacted through the Stock Exchange of Singapore on 29 May 1985.

Since exposing the entire 118,000 shares in a single transaction might have led to a collapse of its price, it is my judgment that the 'married deals' effected were really for the benefit of the defendant. As to the allegation that the 'roll-over' was contrary to the Rules of the Stock Exchange of Singapore and was thus unenforceable, I accept the evidence of PW2 who as an expert witness testified on behalf of the plaintiff and confirmed that there was nothing in the Securities Industry Act 1973 (Singapore) or Regulations prohibiting 'roll-over' transactions. I also accept his evidence that it was a matter of agreement between the broker and his client.

Mr Chandran for the defendant argued that the manner in which the 'roll-over' transactions was done flouted the law of Singapore. Quoting PW1 who said that 'a married deal is effected between two brokers, I believe it was a deal between a broker and a broker ...', learned counsel for the defendant compared it with what Associate Prof Woon said which was that 'he ought to sell it on the market, cross it with another client of his (married deal), or he might take it on his own books'. It was argued that the plaintiff's own expert had stated that 'married deals' are only between two clients of the same broker. Quoting the Stock Exchange of Singapore by-law 14(5) which defines direct business as:

(i) transactions between two member companies; and

(ii) married transactions between two clients within a member company;

Mr Chandran submitted that the so-called 'married transactions' that were effected by the plaintiff on all the 31 roll-over transactions were done between the plaintiff and another broker and not married between two clients of the plaintiff. He urged me to hold that since this was contrary to by-law 14(5)(ii), I ought to hold all 31 roll-over transactions as illegal and void transactions. I am not with Mr Chandran on this. It is obvious that clients of a member company would inevitably trade through their respective brokers. If a buyer of shares and a seller of shares were to trade directly between themselves, there is no need to trade through their brokers by way of a 'married deal'. Therefore, it is obvious to me that when PW1 said that a 'married deal' was transacted between two brokers, this would essentially involve a transaction between 'two clients within a member company' within the meaning of SES by-law 14(5)(ii). On the issue of roll-over by 'book entry' as stated by the expert PW2, and relied on by the defence, I must rule that since this issue was never pleaded, the defendant ought not to be allowed to raise issues not raised in his pleadings. In the circumstances, having considered all matters relating to the 'roll-over' transactions, it is my finding that the defendant must fall on this issue.

Can the plaintiff charge brokerage commission both on sale and purchase in a 'roll-over'?

The defendant's plea is that the plaintiff is prohibited by the Rules of the Stock Exchange of Singapore from charging brokerages both on sale and purchase of shares in a 'roll-over' transaction. In effect, the defendant argued that the plaintiff is not entitled to claim brokerages both on 'first leg' and 'second leg' in a single 'roll-over' transaction.

To my mind, a 'roll-over' transaction of shares involves two new independent bargains. The plaintiff would first sell in the market the same number of shares as were originally purchased. The sale 'closes' the original purchase (the first leg). A second purchase again for the same number of shares as were originally purchased is then entered into by the plaintiff from the market, for settlement on the next ensuing accounting day (the second leg). In this case, contract notes were sent to the defendant in respect of the sale in the 'first leg' and the purchase in the 'second leg'. PW2, the expert, had testified, and I accept his evidence, that in a 'roll-over' there must be a sale and repurchase (also see *Bongiovanni*). It is my judgment therefore that since a 'roll-over' transaction is in the nature of two fresh and independent contracts, the plaintiff is entitled to charge brokerages on both 'the first leg' and 'the second leg'.

I find this issue as raised by the defence, in conflict with the defendant's own evidence where he conceded that the plaintiff is to charge two commissions. For clarity and as amplification of the concession, I reproduce verbatim the question and answer as recorded by the court:

> Q: By using the same figures, will you please calculate the total earnings where there are two fresh contracts instead of a roll-over contract?
>
> A: I have to explain. In a roll-over contract, my broker will first sell off my shares. Brokerage fee of 1% is charged for the sale. On the same day, the same amount of shares will be repurchased at the same original price at which it was sold. Also 1% commission is charged.

Having himself admitted in evidence the plaintiff's entitlement to both the commissions, it ill behoves the defendant to continue to cry foul.

Whether the charging of brokerage commission and interest is in breach of the Rules of the SES?

The defendant pleaded that under the Rules of the Stock Exchange of Singapore, the plaintiff is only entitled either to brokerage commission or to interest if it has financed the purchase of the shares and not to both, and since the plaintiff had made claims under both heads, the plaintiff was in breach of the said Rules and consequently not entitled to maintain any claim. Whilst PW2, Associate Prof Woon was of the view that charging of interest was not against the Rules of the Stock Exchange of Singapore, the defendant had led no evidence to the contrary. In any case, there is clear evidence from the defendant that there was an oral agreement as to the payment of interest although he is disputing the rate of interest charged. However, under cross-examination PW1 agreed that for the months of May, June and July 1985, the plaintiff had charged both interest and roll-over charges and that for these three months the plaintiff had indeed double charged and that the total sum amounted to S$27,471.87. He attributed this double charging to an error by the liquidators and denied a suggestion that the company deliberately falsified the accounts. I had watched PW1 when he gave evidence. I have no reason to believe that he would lie under oath. He is not an interested witness as his employment with the plaintiff had been terminated in law by the appointment of the

liquidator. PW1 is presently employed by the liquidator to assist the liquidator in the winding up of the plaintiff company. I accept PW1's explanation and, in the event I find for the plaintiff, this sum ought to be deducted.

Is the defendant entitled to the dividends on 118,000 units of UMFM shares?

The defendant contended that he was entitled to dividends on the 118,000 units of UMFM shares and not just on 11,000 units which sum had been credited to the account of the defendant. In cross-examination, the defendant was unable to ascertain the ex-date for the dividend payments in respect of the UMFM shares although he could remember that the dividend was paid out on 4 February 1985. The defendant was also unable to remember the last lodgement date for these UMFM shares, though he agreed that he must register the shares before the last lodgement date fixed by UMFM for him to be entitled to the dividend. Needless to say, it is common knowledge that stock brokers would not register the shares of their clients unless instructed to do so by the clients as registration would involve the payment of stamp duties and registration fees. Until the shares are registered in the name of the clients, the shares are in the names of the registered holders of the shares, termed, 'as held in street names'. This principle gives rise to the general view that where a seller of shares to which dividend rights are attached, himself obtains the rights, he must account for them to the purchaser, even if the purchaser had notice of the rights and has allowed time to elapse, without exercising them (see *Halsbury's Law of England* (4th Ed) para 95). PW1 explained that the defendant had given late instructions to the plaintiff to register the shares. Unfortunately, this piece of evidence was unchallenged. On the other hand, the defendant too led evidence that he had given instructions to the plaintiff to register in time the UMFM shares, to enable him to be entitled to the dividend payments. Further, no allegation or evidence of negligence as against the plaintiff on this score, has been shown. It is also relevant to note that all purchase contract notes issued by the plaintiff to the defendant contained the following term:

> NOTE: Please register these shares as soon as possible after delivery as we are unable to accept responsibility for collection of dividends, rights/bonus issues.

The defendant's conclusion — that since the sum of 107,000 shares was not registered, therefore the said shares were not in fact purchased in the first place, or if at all purchased, perhaps were already sold off before they were due for registration — is a conclusion based on no factual premise. The defendant himself admitted that he had purchased the 118,000 units of the UMFM shares between March 1984 to April 1984. In fact, the contract notes in respect of the said purchases were all exhibited in the CABD as agreed and admitted documents. The defendant also admitted that the last sale was done on 27 June 1986. The last roll-over of the 118,000 units of UMFM shares was carried out on 29 May 1985 and the said purchase contract notes were all dated 29 May 1985 and also stamped

on the same day. All the shares purchased on 29 May 1985 were gradually sold and the contract notes in respect of these sales were also exhibited. In fact, the defendant admitted that 7,000 shares were sold on his instructions on 31 May 1985 and 5 June 1985 and that his actual share holding would be 111,000 as at 5 June 1985. A total of 110,000 shares were however disposed off between 16 October 1985 to 27 June 1986. Further, whilst admitting that he gave instructions to register the 118,000 units of UMFM shares, the defendant was only not able to show that he had given instructions before the book-closure date. The defendant cannot approbate and reprobate. The defendant cannot on the one hand argue that he is entitled to dividends in respect of the 118,000 units of UMFM shares and yet on the other hand, contend that the plaintiff had never purchased the said amount or that the plaintiff had sold the said amount before the dividend was declared. The defendant, needless to say, must fall on this issue too.

Whether payment of interest in the absence of a written agreement is acceptable?

The plaintiff's claim for interest is S$349,181.54 from January 1985 to 30 November 1986. PW1 testified that the interest was 16.425% calculated on simple interest. The plaintiff's case is that it is entitled to charge interest against the defendant on the outstanding balance. I note that the said interest charged by the plaintiff between January 1983 to December 1984 was settled by the defendant (see 1CABD 96 which is a letter from the defendant confirming the interest payment). Numerous other documents too have been exhibited which showed clear evidence that the defendant had, without protest, been paying interest at the rate of 16.425%, since 1983.

In contrast, the defendant pleaded that there was no agreement between the plaintiff and the defendant entitling the plaintiff to charge interest and as such the claim for interest is wrong and thus unenforceable. However in court, the defendant gave a different version. Whilst admitting that there was an oral agreement to enable the plaintiff to charge interest, he claimed that the rate was only 10% per annum calculated on a monthly basis. On that score, his counsel was compelled to make the necessary amendment to the pleadings at the conclusion of the trial.

I had overruled the plaintiff's objections and allowed the amendment on the basis that since the defendant had already given evidence that interest was indeed agreed to, but at the rate of 10%, it would not have been just to disallow the amendment since no surprise has been caused to the plaintiff by this request for amendment. There is a radical difference between payment of any interest and payment of interest, but at a different rate. As between the opposing evidence, I was not prepared to accept the defendant's prevarication. In any case, the monthly statements and the individual interest statements sent to the defendant and exhibited as agreed documents show the interest calculated, though the rate of interest is not mentioned. The agreement to pay interest can also be inferred by the conduct of the defendant when he had paid interest, from January 1983 to

December 1984, a period of two years, without any protest. What seems not right with the defendant's evidence is that since he had said that as early as in 1983, he had suspected that the plaintiff was 'not honest in their dealings in respect of my account', yet he continued to trust the plaintiff and continued to deal with the plaintiff, and never once challenged or questioned the plaintiff on the rate of interest or on matters relating to his account. On the evidence, I have no doubt that the defendant well knew that the rate of interest charged was 16.425%. In fact, PW1 testified that this was the same rate of interest charged against other customers of the plaintiff. In respect of a similar situation, I had said in *Perwira Habib Bank (M) Bhd v Penerbitan ASA Sdn Bhd & Ors* [1998] 5 MLJ 297 at p 309:

> It is my finding that the first defendant was at all material times aware that this was the intention of both the parties. DW1 admitted under cross-examination to receiving all the current account statements. If the first defendant was challenging the legality and the entitlement of the bank to do so, no explanation was given as to why the defendant did not raise any objection to such a blatant irregularity in the statements, unless of course the said statements mirrored and reflected the true intention of the parties. That is why the defendants kept quiet.

I am also at a loss to understand why for all those years, the defendant did not know that the rate of interest was 16.425%. There is no doubt in my mind that the defendant is an experienced investor in the stock market. He has been investing substantially. He is fully conversant with terms such as 'contango', 'roll-over' and 'married deals'. To my mind, all that the defendant needed to do was to calculate the rate of interest from any one of the numerous interest statements that he had agreed and admitted into evidence, or at least the defendant could have questioned the interest rate. On this issue too, the defendant must fail.

Compound interest

The defendant argued that the plaintiff had charged compound interest on his margin account which was illegal and thus unenforceable. This is not correct because the interest clause based on the statement, between January 1985 to November 1986 is based on simple interest. As for the period between 1983 to December 1984, PW1 testified that the defendant agreed to the payment of compound interest and this is borne out by the fact that the outstanding interest for that period had been settled by the defendant. Again the defendant's evidence on this issue is at cross-purposes. In examination-in-chief, he maintained that he only discovered the issue of compound interest in April 1986. He however contradicted himself in cross-examination by saying that he had raised the question of compound interest with the plaintiff prior to 1986. Yet there is evidence that he had paid these compound interest from January 1983 to 1984 without any protest. There is also no evidence to show that he had objected to the compound interest charges after he had knowledge of that fact. I hold that the defendant is estopped from denying the plaintiff's entitlement to charge compound interest.

Last sale

The defendant argued that there was no evidence of the last sale of 89,000 units of UMFM shares by the plaintiff. I cannot accept this submission. The sale of this last block of shares is evidenced by Contract No Q13288 and reflected in the OD Statement No 32499 (see 2CABD 227 and 4CABD 527). Further, the defendant had admitted this sale in his defence and under cross-examination admitted to all the contract documents pertaining to this transaction. Pertinent questions and answers relating to the agreed documents must be reproduced:

Q: See 'Nett proceeds of sales RM5,821,326.22'. Is this figure correct and true?

A: Yes, what I gather from the documents.

Q: So the documents must therefore contain true and correct information?

A: It should because it is the plaintiff's documents.

Q: What were the documents?

A: These are the contract notes.

Q: What other documents you have relied on?

A: For the purchase of shares, it's the purchase contract notes and the sales of the shares from the sales contract notes.

Q: In other words, you have relied on documents in CABD 1–4?

A: Yes.

Essentially, the defendant is suggesting that the 89,000 units of UMFM shares were sold earlier, that is, before the dividends in the shares were declared. PW1 had confirmed that the sale was done through 'marriage contracts'. Further the expert PW2 had confirmed that in a 'married deal' there was no requirement to inform the client. This issue too must fail.

Fiduciary relationship

The defendant seeks to advance the argument that there is a fiduciary relationship between the broker and his client. Whilst there is an element of fiduciary relationship in most contracts, I cannot subscribe to the defendant's view that fiduciary relationship exists in this case as a result of s 111 of the Evidence Act 1950. The said section reads:

> Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.
>
> ILLUSTRATIONS
>
> (a) The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney.
>
> (b) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father.

If I accept the submission of the defendant on this score, then clearly the burden of proving the good faith of the transaction would have shifted to the plaintiff. A

After both counsel had made their submissions, and before my decision, I recalled both counsel and heard further submissions on this issue. It is my judgment, that if the defendant had intended to rely on s 111 of the Evidence Act 1950 to support his argument that the burden is with the plaintiff to show good faith, then such an argument should have been advanced at the commencement of the trial before I had heard all the evidence. Since the plaintiff had already adduced its evidence and since the defendant had also adduced evidence and argued that the transactions are illegal, I questioned counsel for the defendant as to how I could, at this stage, accept this submission. Since I had already considered and rejected the issues raised by the defendant, it is my judgment that s 111 of the Evidence Act could not apply in this case. B C

In any case, even if I were to consider s 111, for the said section to be effective, there must be good faith and that one party must stand in 'active confidence'. Here there is no doubt that the transactions were done in good faith. However, the issue is, is there a requirement, for the plaintiff broker to be in 'active confidence'. The requirement of this proof still rests with the defendant. The defendant must satisfy the court that there existed between him and the plaintiff a relationship of an 'active confidence'. Once he establishes that, then the burden shifts to the plaintiff to show that it had exercised good faith during the transactions. It is my view that a mere relationship of confidence per se between a broker and his client will not be sufficient to invoke s 111 of the Evidence Act 1950 as there must be a relationship of 'active confidence'. It is a fact that in every contract entered into between two parties, there is bound to be a relationship of confidence between them. D E F

It is pertinent to look at the two illustrations given to s 111. The two illustrations show that the section actually intended to refer to a person in an inferior position, who, being in such an inferior position and by reason of his relationship to the other, is unable to make an independent decision, without any influence or persuasion by the party in a superior position. G

To my mind, it is a question of fact in each case, whether the relationship between two contracting parties can give rise to a relationship of 'active confidence' in one against the other. It is my judgment that the burden is on the defendant to establish that the plaintiff was standing in a position of 'active confidence' to him in the sense that the defendant could not, by reason of his relationship with the plaintiff, make his own independent decisions. H

The facts show that the defendant is an experienced investor based on the large quantity of shares he had trade in. His experience in share trading is further evidenced by the fact that he had traded with other brokers prior to engaging the plaintiff. The defendant had adduced no evidence to show that he had at any time relied on the plaintiff for information about investment strategies and market performance. The defendant led no I

evidence to show that he had acted on the plaintiff's recommendation and advice and allowed the plaintiff to influence his trading decisions. The defendant led evidence that he would telephone EG Tan and give instructions by directing him to either purchase or sell the shares at a certain price. He was not at all concerned with the particulars of the sellers or the buyers. The instruction given by the defendant to the plaintiff was a particular instruction in clear terms which gave no room for the plaintiff to exercise any discretion with regard to the purchase and sale of his shares once the relevant price indicated by the defendant became available. It is my judgment that the defendant has failed to satisfy the court that s 111 of the Evidence Act 1950 is applicable in this case.

Having considered the submissions and read all the authorities of counsel, I give judgment for the plaintiff for:

(i) the sum of S$907,159.42 less S$27,471.87 (the exchange rate to be calculated based on the rate then existing as at 31 July 1985);

(ii) interest thereon at the rate of 16.425% per annum from 1 December 1986 to the date of final payment; and

(iii) costs.

Claim allowed.

Reported by Loo Lai Mee